BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JACK VALENTINO Claimant	)	
VS.	)	
NATIONAL CARRIERS, INC. Respondent	)	Docket No. 1,013,061
AND	)	
ZURICH NORTH AMERICA Insurance Carrier	)	

ORDER

Claimant requests review of the January 28, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

ISSUES

The ALJ denied claimant's preliminary hearing request for temporary total disability benefits and payment of outstanding medical bills, as well as further treatment. The ALJ concluded the claimant's accidental injury did not occur while he was "on duty". Thus, his accident is not compensable under Kansas law.

The claimant requests review of this decision alleging the ALJ erred in denying his claim. Claimant argues he was injured while performing a pre-trip inspection of his vehicle. This inspection is required by respondent for each of claimant's trips and therefore, claimant maintains he was within the scope of his employment with respondent when he was injured.

Respondent contends claimant's accidental injury occurred as he was on his way in to the facility. Claimant was not scheduled to make any hauls on that day and as such, he is not entitled to any benefits under the Kansas Workers Compensation Act.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) finds the ALJ's preliminary hearing Order should be set aside and this appeal should be dismissed.

Claimant and respondent entered into a written agreement on November 9, 2001. This agreement provides as follows:

> The parties to this Agreement intend to create an Independent Contractor relationship and not an employer/employee relationship. In recognition of the independent contractor relationship which exists between the parties, it is acknowledged that Independent Contractor has the right to determine the manner and means of performing all work hereunder, Independent Contractor has the right to decide what work to perform under this Agreement; provided, however, that when work is accepted by Independent Contractor, the work will be performed in accordance with the terms of this Agreement, the requirements, if any, of Carrier's customers, and all the applicable laws and governmental regulations. In no event shall any contracts or statements of Carrier or Carrier's agents or employees be deemed, construed or implied to control, direct, or infringe on Independent Contractor's right to control or direct the manner and means of Independent Contractor's performance of the services contemplated in this Agreement.[2]

Consistent with the terms of their agreement, claimant leased a 2001 FRGT tractor from respondent and began providing his services, performing what is referred to as the "gut" run. On this run, claimant would regularly haul a trailer from Liberal, Kansas to Garden City, Kansas. At various other times he would also make a "box" run, taking a load of boxes from one plant to another as needed.

Claimant was paid for his services in the manner set forth in the agreement. He was required to pay for workers compensation insurance, and those premiums were deducted

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[1] K.S.A. 44-501, et seq.

[2] P.H. Trans., Ex. 2.

from his weekly settlements.[3] Claimant, as an independent contractor, d/b/a Dream Catcher Express, is insured by Lumbermens Underwriting Alliance.[4]

At the preliminary hearing, claimant testified he is self-employed and doing business under the name Dream Country Express.[5] In fact, he has amended the E-1 and has declared himself, d/b/a Dream Catcher's Express, to be the employer.[6] According to claimant's brief to the board, [t]he initial pleadings filed in these proceeding [sic] mistakenly identify National Carriers, Inc., as Claimant's employer."[7]

Based upon this most recent filing, the Board finds claimant's appeal is moot and should be dismissed. Claimant maintains he is a self-employed independent contractor. Although not wholly dispositive of the legal issue, the contract between himself and respondent certainly acknowledges their relationship as one of independent contractor and principal.

Such arrangements are statutorily recognized under Kansas law. Individuals who own and operate a truck or tractor and who lease their equipment to a licensed motor carrier are precluded from recovering workers compensation benefits from that motor carrier if (1) the individual is covered by an occupational accident insurance policy and (2) the individual is not treated as an employee for purposes of federal social security, old age health insurance, and federal taxes. K.S.A. 44-503c(a)(1)(a) provides:

> Any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor or an employee of the licensed motor carrier within the meaning of K.S.A. 44-503 . . . or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508 . . . if the owner-operator is covered by an occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, . . . the federal social security act, . . . the federal unemployment tax act, . . . and the federal statutes prescribing income tax withholding at the source. . .[8]

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[3] P.H. Trans. at 7-8.

[4] See Notice of Hearing-Amended Application (to amend respondent & insurance carrier) issued February 11, 2004.

[5] P.H. Trans. at 6.

[6] Claimant's Brief at 1, footnote 1.

[7] Claimant's Brief at 1.

[8] K.S.A. 2003 Supp. 44-503C(a)(1)(a).

Based on the provisions of the above-referenced statute, claimant is precluded from asserting a claim against this respondent. Claimant testified that he leases the tractor from respondent and it appears from all the evidence produced at the hearing that he is the exclusive driver of that motor vehicle. Claimant further testified that he paid for workers compensation insurance through deductions from his weekly settlement checks from respondent. The fact that these payments are deducted and tendered by respondent to the insurer is not unusual. In fact, that process is specifically provided for in the statute.[9] Finally, there is no evidence within the record that claimant was treated as any thing other than an independent contractor for purposes of the federal programs listed in the statute.

Put simply, there is no basis in this record to conclude that this respondent bears any workers compensation liability to the claimant in light of his factual contention that he is a self-employed independent contractor. Claimant may well have a claim against himself and his carrier for his August 11, 2003 injury, but in light of the evidence put forth at this juncture of the claim, claimant is entitled to no benefits under the act against this respondent. By claimant's own admission, he was not an employee of this respondent. Thus, the ALJ's preliminary hearing Order must be set aside and this appeal dismissed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated January 28, 2004, is set aside and the claimant's appeal is dismissed.

IT IS SO ORDERED.

Dated this _____ day of March 2004.

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BOARD MEMBER

c: Michael A. Doll, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[9] K.S.A. 44-503c(b).